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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BATTLE MOUNTAIN BAND OF THE TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS,

Plaintiff,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT and JILL C. SILVEY, in official capacity as Bureau of Land Management Elko District Manager,

Defendant.
_______________________________________/

Case No. 3:16-cv-00268-LRH-WGC

RESPONSE IN OPPOSITION TO MOTION TO INTERVENE

I. THE MINE DOES NOT HAVE A RIGHT TO INTERVENE UNDER FRCP 24(A)

In its motion to intervene, the Mine expressly states that it is not moving to intervene under Federal Rule of Civil Procedure 24(b) unless its motion to intervene under FRCP 24(a)(2) is denied. The Band therefore begins with whether this Court should grant the Mine's motion to intervene under FRCP 24(a)(2).

FRCP 24(a)(2) permits a party to intervene of right only if it:

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Federal courts parse this rule into four elements, all four of which must be met for a party to intervene of right. *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (quoting *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993)). The Mine has timely moved to intervene, but it has not shown an interest in the current proceeding which may be impaired and it has not shown that its interests are not adequately represented by existing parties.

A. THE MINE HAS NO INTEREST IN THIS CASE AS THAT TERM IS USED IN RULE 24(A).[1]

The Band's action is against the BLM, not against the Mine. The Band's action is based upon BLM's violations of the National Historic Preservation Act (NHPA), which require the United States to protect the Traditional Cultural Property (TCP). If the Band prevails, then the United States would have both the power and the duty to take the action that the Tribe is demanding, but it would then be that federal action, in compliance with the BLM's duty under federal law, which would allegedly impact the Mine's interests. The Mine plainly has no protectable interest in BLM violating the NHPA.

B. THE MINE'S INTERESTS ARE ADEQUATELY REPRESENTED BY THE UNITED STATES.

The Mine is not permitted to intervene under Rule 24(a) unless it shows that its interests are not adequately represented by the United States.

> The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties. 7C Wright, Miller & Kane, § 1909, at 318 (1986). When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. *League of United Latin Am. Citizens*, 131 F.3d at 1305. If the applicant's interest is identical to

[1] The third element of the test (whether movant's protectable interest may as a practical matter be impaired) is dependent on the movant having met the second element (whether movant has a protectable interest). Because the Mine has no protectable interest in this matter, it also does not meet the third element.

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> that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation. 7C Wright, Miller & Kane, § 1909, at 318–19.
>
> There is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents. *City of Los Angeles*, 288 F.3d at 401. In the absence of a "very compelling showing to the contrary," it will be presumed that a state adequately represents its citizens when the applicant shares the same interest. 7C Wright, Miller & Kane, § 1909, at 332. Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention. *City of Los Angeles*, 288 F.3d at 402.

Arakaki v. Cayetano, 324 F.3d 1078, 1086-87 (9th Cir. 2003), *as amended* (May 13, 2003).

Here the Mine and BLM both have the same interest in providing for an additional power line to the mine in a manner which complies with federal law. Additionally, but wrongly, BLM is asserting that putting a power line directly through the TCP would comply with federal law, which is exactly what the Mine wants. The Tribe brought suit against BLM precisely because BLM is authorizing the exact action that the Mine wants to take instead of BLM carrying out its obligations under federal law. It is the United States failure to comply with Federal law that the Band is challenging, not the Mine or its interests. *E.g., Sierra Club*, 995 F.2d 1478, 1484-85 (holding that only the federal government can be a defendant in a lawsuit seeking compliance with NEPA since NEPA only regulates the conduct of the federal government, not private parties).

The Mine's attempt to get around the above requirement is to assert that its interests are not aligned with the United States because it disagrees with a decision the United States issued on April 25, 2016, and asserting that if the April 25, 2016 decision is invalid, then the Band's challenge to a subsequent federal action would become moot. As a legal matter, the Band disagrees with the latter assertion. While the April 25 action necessarily leads to the Band prevailing in this case, the inverse is not true: the Band has alleged sufficient facts supporting relief even if the April 25 action had never occurred. But more important for current purposes, the Band is not challenging the April 25 action in its favor. A challenge to that action would be a separate matter, which the Mine would have to bring (and which it is seeking to bring through a proposed counterclaim against the Band or BLM) but which it cannot bring because the Band or BLM would be an indispensable unjoinable party to that suit. *E.g.*, *Village of Hotvela Traditional Elders v. Indian Health Services*, 1 F. Supp.2d 1022, 1030 (D. Ariz. 1997), *aff'd*, 141 F.3d 1182 (9th Cir. 1998), *cert. denied*, 525 U.S. 1107 (1999); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460-61 (9th Cir. 1994). Additionally, the Mine has no role in the identification of the TCP (the action which the United States took on April 25, 2016) or in determining eligibility under the NHPA. These decisions are solely for the United States to make under the NHPA.

What makes the present matter different from most which come before this Court is that the Band is an Indian Tribe, with sovereign immunity from unconsented suit. It brought suit against BLM, not the Mine, and it therefore has not waived its sovereign immunity from the counterclaim that the Mine is seeking to bring related to the validity of the April 25, 2016 action. E.g., *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991); *Ute Indian Tribe v. Utah*, 790 F.3d 1000 (10th Cir. 2015) (even where the Tribe had brought suit against the State of Utah, the Tribe had not waived sovereign immunity for counterclaims by the State). Here, the Band has not brought any claim against the Mine, and has not waived its immunity to claims by the Mine.

Indian tribes enjoy immunity from suits whether the conduct giving rise to a complaint occurs on or off reservation. *Id*. Moreover, tribal immunity applies not only to suits for damages but to counterclaims seeking declaratory and injunctive relief. *E.g., Imperial Granite Co.*, 940 F.2d 1269; *Ute Indian Tribe v. Utah*, 790 F.3d 1000. As pertinent here, a tribe does not waive its sovereign immunity "from actions that could not otherwise be brought" against it merely because the claims are "pleaded in a counterclaim to an action filed by the tribe." *Okla. Tax Comm'n v. Potawatomie Indian Tribe*, 498 U.S. 505 (1991). This rule applies even to compulsory counterclaims under Rule 13(a). *Macarthur v. San Juan County*, 391 F. Supp. 2d 995, 1036 (D. Utah 2005).

There are only two ways that a tribe can lose sovereign immunity, either 1) Congress can waive tribal immunity; or 2) a tribe can waive its immunity. *Oklahoma Tax Comm'n v. Citizen Band*

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Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991). There can be no "waiver of tribal immunity based on policy concerns, or perceived inequities arising from the assertion of immunity, or the unique context of a case." *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

The Mine has not alleged and would not have a basis to allege that there is an applicable waiver for its proposed counterclaim against the Band, and therefore it cannot bootstrap from that barred counterclaim into intervention in this case.

II. THE MINE IS NOT PERMITTED TO INTERVENE UNDER FRCP 24(B).

FRCP 24(B) permits a party to intervene if it has a claim or defense that shares with the main action a common question of law or fact. The Mine asserts that it meets this requirement based upon its disagreement with BLM's April 25, 2016 actions. But as discussed above, the Band has not waived its sovereign immunity to the Mine's claim, and therefore that barred claim cannot form the basis for intervention.

CONCLUSION

The Mine simply failed to consider the fact that the Band is an Indian Tribe, with sovereign immunity, and it therefore provided an argument for intervention which is without merit as it applies of the facts of this case. The Mine's motion to intervene is grounded in the interests it asserts in its proposed counterclaim, but that counterclaim is barred, and intervention is therefore barred. For the claims that are at issue in this matter, the United States adequately represents the Mine's interests.

Respectfully submitted this 31st day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 31th day of May, 2016, I electronically filed the foregoing **RESPONSE IN OPPOSITION TO MOTION TO INTERVENE** with the Clerk of the Court and served on all parties of record using the CM/ECF System.

/s/ Ashley Klinglesmith
Ashley Klinglesmith
Legal Secretary/Paralegal